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In the Supreme Court of the United States

OCTOBER TERM, 1994

HARRY ZYCH D/B/A AMERICAN DIVING AND SALVAGE CO., PETITIONER

v.

ILLINOIS HISTORIC PRESERVATION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's *in rem* admiralty action in federal court seeking a salvage award against the State of Illinois is barred by the Eleventh Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 21-32) is reported at 19 F.3d 1136. The decision of the district court is reported at 811 F. Supp. 1300. A prior decision of the court of appeals (Pet. App. 1-20) is reported at 941 F.2d 525, and a prior decision of the district court is reported at 746 F. Supp. 1334.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 1994. A petition for rehearing was denied on April 22, 1994. Pet. App. 0. The petition for a writ of

certiorari was filed on July 19, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Abandoned Shipwreck Act of 1987, Pub. L. No. 100-298, 102 Stat. 432, to resolve longstanding confusion over whether the federal government or the States own and have responsibility for managing historic shipwrecks. See Pet. App. 6-7. Under the Act, the United States asserts title to "any abandoned shipwreck" that is: (1) embedded in submerged lands of a State; (2) embedded in coralline formations protected by a State on submerged lands of a State; or (3) on submerged lands of a State and is included in or determined eligible for inclusion in the National Register of Historic Places. 43 U.S.C. 2105(a). The Act then transfers title from the United States "to the State in or on whose submerged lands the shipwreck is located." 43 U.S.C. 2105(c). The Act additionally provides that "[t]he law of salvage and the law of finds shall not apply to abandoned shipwrecks to which * * * this [Act] applies." 43 U.S.C. 2106(a).

2. In 1989, petitioner, the operator of a commercial salvage business, located a wrecked ship, the Seabird, at the bottom of Lake Michigan. Petitioner filed an *in rem* admiralty action in federal district court seeking a declaration of ownership under the law of finds, or, in the alternative, a salvage award from its true owner under the law of salvage. The Illinois Department of Transportation and the Illinois Historic Preservation Agency intervened on behalf of the State of Illinois to assert title to the Seabird and to argue that the Eleventh Amendment barred petitioner's salvage claim in federal court. No other party claimed title to the Seabird. Pet. 5-6; Pet. App. 2-3.

Petitioner contested the State's claims. He contended that the Eleventh Amendment was not a bar to the action and that the Abandoned Shipwreck Act was unconstitutional to the extent that it prevented him from obtaining title or barred his salvage award under federal admiralty law. The United States intervened to defend the Act's constitutionality. The district court rejected the constitutional challenge, concluded that the Eleventh Amendment barred a salvage action against the State, and dismissed petitioner's suit. *Zych* v. *Unidentified, Wrecked & Abandoned Vessel*, 746 F. Supp. 1334 (N.D. Ill. 1990).

The court of appeals reversed, ruling that the district court's examination of the constitutionality of the Act was premature. Pet. App. 1-20. The court of appeals explained that the Abandoned Shipwreck Act comes into play in this case only if the Seabird is embedded in the State's submerged lands and that the district court had failed to make a conclusive factual finding on that matter. *Id.* at 8-10, 15. The court also found it unnecessary to decide at that juncture of the litigation whether the Eleventh Amendment barred petitioner's suit. *Id.* at 19. The court of appeals accordingly remanded the case for a factual finding of whether the Seabird was "embedded" under the terms of the statute and, if necessary, a determination of the Act's constitutionality. *Id.* at 20.

3. On remand, the district court found that the Seabird was in fact "embedded" within the meaning of the Abandoned Shipwreck Act and that the Act therefore applied to the shipwreck. *Zych* v. *Unidentified, Wrecked & Abandoned Vessel*, 811 F. Supp. 1300, 1304-1305 (N.D. Ill. 1992). The district court additionally concluded that the Act, which vested title in the State and prohibited salvage actions, was constitutional. *Id.* at

1308-1321. The district court accordingly dismissed petitioner's admiralty case, which sought either a declaration of title or a salvage award. *Id.* at 1321. On appeal, petitioner abandoned his claim to title and raised only his claim for a salvage award from the State. See Pet. 9; Pet. App. 21, 23.

The court of appeals affirmed. Pet. App. 21-32. The court concluded that petitioner's suit was effectively "a suit against Illinois because [petitioner] seeks a salvage award from Illinois." *Id.* at 28-29. The court of appeals ruled that petitioner's suit was therefore barred by the Eleventh Amendment. Pet. App. 29. The court also noted, in agreement with the district court, that the Abandoned Shipwreck Act's exclusion of a salvage suit against a State, see 43 U.S.C. 2106, does not violate the Constitution's implied limitation on admiralty legislation, which requires Congress to preserve the historic contours of the federal courts' admiralty jurisdiction. Pet. App. 24-25. See *Panama R.R.* v. *Johnson*, 264 U.S. 375, 386 (1924). The court explained that the Act did not exclude a matter that historically fell within admiralty jurisdiction, because the Eleventh Amendment had barred jurisdiction over petitioner's suit even prior to the passage of the Act. Pet. App. 27-32.

ARGUMENT

The court of appeals correctly concluded that the Eleventh Amendment bars petitioner from bringing an *in rem* admiralty action to obtain a salvage award against the State of Illinois. The court's decision is consistent with the decisions of other courts of appeals and does not present an issue warranting this Court's review.

1. The Eleventh Amendment prohibits a citizen from bringing suit in federal court against any State,

including the citizen's own State, unless the State consents or Congress abrogates the State's sovereign immunity. See *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 237-240 (1985). Eleventh Amendment principles apply in admiralty proceedings. See *Florida Dep't of State* v. *Treasure Salvors, Inc.*, 458 U.S. 670, 683 n.17 (1982) (plurality opinion); *Ex parte New York (I)*, 256 U.S. 490, 497-501 (1921); *Ex parte New York (II)*, 256 U.S. 503, 510 (1921). For purposes of the Amendment, a suit against an agency or department of a State is a suit against the State. See *Alabama* v. *Pugh*, 438 U.S. 781 (1978). Petitioner's claim was brought *in rem* against a ship now conceded to be owned by the State through its agencies, and is accordingly a suit against the State. The suit seeks money damages from the State in the form of a salvage award and is therefore barred by the Eleventh Amendment.[1]

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[1] In some circumstances, the Eleventh Amendment permits suit against state officers rather than the State itself. See *Ex parte Young*, 209 U.S. 123 (1908). However, even where a suit is brought against state officers, federal courts lack jurisdiction over a case that could involve the award of damages that would have to be paid by the State. See *Edelman* v. *Jordan*, 415 U.S. 651, 663 (1974). This case involves a salvage claim against the State. Pet. App. 21, 27. Admiralty courts typically find monetary awards the most appropriate form in which to grant such a salvage award. See, *e.g.*, *Platoro, Ltd.* v. *Unidentified Remains of a Vessel*, 695 F.2d 893, 903-904 (5th Cir.) (observing that "[w]e cannot find a case where the salvage award was expressed in terms of the *res* rather than in dollars" and remanding for a determination of the dollar amount of the award), cert. denied, 464 U.S. 818 (1983); *Chance* v. *Certain Artifacts Found & Salvaged from the Nashville*, 606 F. Supp. 801, 808 (S.D. Ga. 1984). Although a salvor may bring an *in rem* action to obtain a lien on the salved property, the lien simply secures monetary payment. *The "Sabine,"* 101 U.S. 384, 386 (1880); 3A M. Norris, *Benedict on Admiralty: The Law of Salvage* §§ 150,

The courts of appeals are in general agreement that the Eleventh Amendment deprives federal courts of subject matter jurisdiction to adjudicate a State's interest in a shipwreck without the State's consent. See *Zych* v. *Wrecked Vessel Believed to be the "Lady Elgin,"* 960 F.2d 665, 669-670 (7th Cir.), cert. denied, 113 S. Ct. 491 (1992); *Fitzgerald* v. *Unidentified Wrecked & Abandoned Vessel*, 866 F.2d 16, 18 (1st Cir. 1989); see also *Subaqueous Exploration & Archaeology, Ltd.* v. *Unidentified, Wrecked & Abandoned Vessel*, 577 F. Supp. 597, 603-605 (D. Md. 1983); cf. *Marx* v. *Government of Guam*, 866 F.2d 294, 301-302 (9th Cir. 1989) (suit barred due to territory of Guam's similar common law sovereign immunity). The federal courts are likewise in general agreement that if—as here—the State concededly owns the vessel, the Eleventh Amendment bars a suit seeking a salvage award against a State. See *Chance* v. *Certain Artifacts Found & Salvaged from the Nashville*, 606 F. Supp. 801, 808 (S.D. Ga. 1984); *Subaqueous Exploration & Archaeology, Ltd.* v. *Unidentified, Wrecked & Abandoned Vessel*, 577 F. Supp. 597, 606-607 (D. Md. 1983).[2]

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155 (7th ed. 1993). This case accordingly involves an effort to obtain money damages from the State. Thus, even if petitioner had brought suit against state officers in federal court, petitioner's suit would be barred by the Eleventh Amendment. Cf. *Florida Dep't of State* v. *Treasure Salvors, Inc.*, 458 U.S. 670 (1982) (holding that a district court's issuance of process against state officials to bring artifacts from a shipwreck into court's jurisdiction, which would impose no burden on State's treasury, is not barred by the Eleventh Amendment).

[2] One district court reached a different conclusion in a decision issued prior to this Court's decision in *Treasure Salvors, supra*, which provides additional guidance on the application of Eleventh Amendment principles in admiralty. See *Cobb Coin Co.* v.

Contrary to petitioner's suggestion (Pet. 13-14 n.4), the decision of the court of appeals does not conflict with the decision of the Third Circuit in *Sindia Expedition* v. *Wrecked & Abandoned Vessel, Known as "The Sindia,"* 895 F.2d 116 (1990). *Sindia Expedition* involved an *in rem* complaint to establish title to a shipwreck among non-state parties under the law of finds and to determine relative salvage rights among those parties. *Id.* at 120-121. The court of appeals held that the Sindia Expedition's admiralty complaint *in rem* was not barred by the Eleventh Amendment because "the action is a genuine admiralty *in rem* action against the vessel" to determine ownership interests and is "not a circuitous * * * action to obtain jurisdiction over the State for purposes of money damages." *Id.* at 120. The court specifically noted that "the effect of the proceeding will be, if the [Sindia] Expedition is successful, to award it possession to the Sindia as against [the non-state] parties and not against the State." *Id.* at 121. Here, by contrast, petitioner seeks to recover a salvage award from the State of Illinois.

2. Because the court of appeals' Eleventh Amendment ruling disposes of the case on jurisdictional grounds, there is no occasion for this Court to consider petitioner's contention that the Abandoned Shipwreck Act is unconstitutional. In any event, petitioner's constitutional claims are without merit. Petitioner first

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Unidentified, Wrecked & Abandoned Sailing Vessel (Cobb Coin I), 525 F. Supp. 186, 197-199 (S.D. Fla. 1981). That court has since followed its prior decision. *Cobb Coin Co.* v. *Unidentified, Wrecked & Abandoned Sailing Vessel (Cobb Coin II)*, 549 F. Supp. 540, 551-554 (S.D. Fla. 1982). A conflict between the court of appeals' decision here and a district court decision, however, does not warrant this Court's review.

contends (Pet. 11-17) that the Act violates the Admiralty Clause of Article III of the Constitution by excluding salvage claims against a State from federal admiralty jurisdiction. Under this Court's decision in *Panama R.R.* v. *Johnson*, 264 U.S. 375 (1924), a statute contravenes the Admiralty Clause if it (1) excludes a subject traditionally falling within federal admiralty jurisdiction or includes a subject traditionally falling outside it, or (2) does not "operate uniformly in the whole of the United States." 264 U.S. at 386-387. Prior to the passage of the Act, most federal courts sitting in admiralty had concluded that salvage law did not apply to abandoned shipwrecks.[3] The Act's general exclusion of salvage claims against abandoned shipwrecks therefore probably did not alter federal admiralty jurisdiction.[4]

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[3] See, *e.g.*, *Columbus-America Discovery Group* v. *Atlantic Mut. Ins. Co.*, 974 F.2d 450, 460 (4th Cir. 1992), cert. denied, 113 S. Ct. 1625 (1993); *Martha's Vineyard Scuba Headquarters, Inc.* v. *Unidentified, Wrecked & Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987); *Chance*, 606 F. Supp. at 804; see also Gov't C.A. Br. 20; Pet. App. 28; but see *Treasure Salvors, Inc.* v. *Unidentified, Wrecked & Abandoned Sailing Vessel* (*Treasure Salvors I*), 569 F.2d 330, 336-337 (5th Cir. 1978).

[4] Furthermore, even if the suit could proceed, petitioner would be unlikely to succeed on the merits in his attempt to obtain a salvage award. Under the prevailing view, the law of salvage applies only when an original owner or successor in interest appears to claim the property. See Gov't C.A. Br. 20, 26. The State was neither the original owner of the Seabird nor a successor in interest. Salvage law also requires that the salved property have been in "peril," a claim that may be impossible to establish with regard to long lost property that is at rest on the seabed. See *Columbus-America Discovery Group*, 974 F.2d at 460; but see *Treasure Salvors I*, 569 F.2d at 336-337 (noting that this is a question of some dispute); *Platoro*, 695 F.2d at 901 (following *Treasure Salvors I*).

As for uniformity, the Abandoned Shipwreck Act establishes a uniform rule throughout the United States recognizing that the States hold title to abandoned shipwrecks described within the Act. Although the States may thereafter accord varying treatment to shipwrecks or their artifacts under state statutes, those differences do not implicate constitutional concerns. The uniformity principle under the Admiralty Clause leaves States free to enact their own legislation as long as it is neither "hostile to the characteristic features of the maritime law or inconsistent with federal legislation." *Just* v. *Chambers*, 312 U.S. 383, 388 (1941) (also noting the "numerous instances in which the general maritime law has been modified or supplemented by state action"); see also *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325, 341 (1973) ("Even though Congress has acted in the admiralty area, state regulation is permissible, absent a clear conflict with the federal law.").

Petitioner additionally contends (Pet. 17-20) that the Abandoned Shipwreck Act violates the Tenth Amendment by appropriating property that may have belonged to a State and vesting title to it in the federal government. The Act, however, asserts federal title to abandoned shipwrecks in order to ensure that title can thereafter be vested in the States. See 43 U.S.C. 2105(a) and 2105(c). The Act does not present a situation in which Congress has impermissibly commandeered "state governments into the service of federal regulatory purposes" or has in any way encroached upon state interests. *New York* v. *United States*, 112 S. Ct. 2408, 2428 (1992).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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